IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

WRIT PETITION NO.4298 OF 1989

1. Suresh Cooperative Housing Society,
having office at 4 'Sukhadam', 199 Gauthan
Road No.1, Chembur, Bombay 400071
2. Dr.S.J. Shanghavi,
3. Smt.Kantaben Shanghavi,
4. P.G.Nair, Advocate,
Nos 2 and 3 residing at
22, Muni Niwas, 68 Kataria Marg,
Matunga Road, Bombay 400 016.
No.4 having office at Kalbadevi Road,
Bombay 400 002. .. Petitioners.

Vs

1.M/s Pushpa Cosntruction &
Builders, 20, Padmini Building,
Pestom Sagar, Chembur, Bombay -89
through its Partner A.K.Rajan, since
deceased by his heirs and legal
representatives:-
1E Smt.Pushpa Valli Rajan,
1F Miss Lejina Rajan, minor through
her mother and natural guardian
Nos.1E and 1F residing at 20,

Padmini Building, Peston Sagar, Chembur
Bombay -89. .. Respondents

Ms A.R.S.Baxi, for the petitioners.

Mr Rajeshwar, for Respondent no.1E

CORAM : D.B.BHOSALE,J.

DATE : 20th September, 2004.

ORAL JUDGMENT:

1. This petition is directed against the judgment and order dated 29.6.1981 rendered by the Maharashtra State Co-operative Appellate Court, Bombay in Misc. Application No.14-A of 1987 in Appeal No.19 of 1987 in Case No CCI/503 of 1985, by which the application filed by the respondent-third party has been allowed. Petitioner nos.2 to 4 filed the Dispute bearing Case No.CCI/503/85 against petitioner no.1-society. In the Dispute, petitioner nos 2 to 4 filed the application for interim reliefs. The Co-operative Court granted ad-interim relief in terms of prayer clauses (a) and (c) of the application by order dated 5.9.85. Prayer clauses (a) and© (c) read thus

> "(a) from carrying on further building construction work on plot no.41, Pestom Sagar, Chembur, Bombay and/or demanding any contribution from the Disputants for

the said purpose without obtaining "No Objection Certificate" from the Central Railway Authorities.

(c) from disposing of or putting any other person or persons other than the Disputants either by the opponents society or by the Contractor or dealing with in any manner whatsoever affecting the rights, title and interest of the Disputants Nos 1,2 and 3 in their respective flats viz. Flat No.1 on the ground floor, Flat No.11 on the ground floor and flat no.5 on the first floor of the opponent society's building on plot no.41, Pestom Sagar, Chembur, Bombay-40089"

2. Though the ad-interim relief was granted in terms of prayer clauses (a) and (b), the Co-operative Court, by its order dated 20.11.1986 vacated the ad-interim relief granted in terms of prayer clause (a) and petitioner no.1 -society was restrained from parting with possession of flat nos 1 and 11 on the ground floor and flat no.5 on the first floor in the opponents-society building at plot no.41, Peston Sagar,

Chembur until further orders. Feeling aggrieved by the order dated 20.11.1986 passed by the Co-operative Appellate Court, petitioner nos 2 to 4 filed the Appeal bearing no.19 of 1987 in which on 14.1.1987 an order of status-quo was passed.

2.1 In Appeal No.19 of 1987, the respondents filed an application on 25.3.1987, which was numbered as Misc. Notice No.14A of 1987, and made the following prayer.

> "I, therefore, submit and pray that in the interest of justice this Hon'ble Court may be pleased to modify the order by vacating the injunction against the respondents in respect of the payment to the Contractors as sought in prayer (a) and (b) of the original dispute."

2.2 The prayer made by the respondents in Misc.Notice No.14A of 1987 was defective. The respondents proceeded on the assumption that there was injunction running against the society in terms of prayer clauses (a) and (b). In fact, the ad-interim relief granted in terms of prayer (a) was vacated by the order dated 20.11.1986, which was impugned in the appeal. The Co-operative Appellate Court, however, without applying its mind to

the facts of the case, passed the order dated 29.6.1989 in Misc.Notice No.14A of 1987 taken out by the respondent-third party and granted the following reliefs in their favour.

> "The Miscellaneous Application of the third party is allowed. The respondent-society should pay Rs.1,95,799.76 as dues payable on account after 9th bill with interest agreeable to pay on this delayed payment under contract i.e. at 18% per annum subject to accounts from 27.2.1987 till full payment. The Builders on receipt of such payment would be liable to carry out further remaining work of construction as early as possible and not beyond the period of 4 months after the receipt of such payment. The Builders would be entitled for the dues after final bills are submitted on completion of the remaining work if any found due and payable and that payment would be again subject to the rights of the society for claiming damages by

substantive proceedings on the basis of any allegations they may make on advise."

3. This order cannot be sustained and must be set aside.. It cannot be conceived that such order could be passed in the application filed by the respondent- third party, who never applied for intervention in the appeal. The respondent even did not make such prayer which was granted by the Co-operative Appellate Court by the impugned order. Mr.Rajeshwar, learned counsel for the respondents, could not and did not justify or support the impugned order in view of the fact that the respondent had neither applied for intervention in the matter nor did he pray for the relief, that had been granted in favour of the respondents. In the circumstances, the impugned order must be set aside. It may be noticed that the respondents have already filed Regular Civil Suit No.791/90 in this Court for appropriate reliefs and the suit is still pending for disposal. It is open for the respondents to pursue the suit or any other remedy as may be advised against the society.

4. In the circumstances, this writ petition is allowed. The impugned order dated 29.6.1989 is quashed

and set aside. There will be no order as to costs. Rule is accordingly disposed of.

(D.B.BHOSALE, J.)

HIGH COURT
CIVIL **APPELLATE SIDE**

WRIT PETITION NO.4298 OF 1989

Date of Judgment:

20th September, 2004

For approval and signature

THE HON'BLE MR.JUSTICE D.B.BHOSALE.

1. Whether Reporters of Local Papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the Judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any Order made thereunder?

5. Whether it is to be circulated

to the Civil Judges?

6. Whether the case involves an important question of law and whether a copy of the judgment should be sent to Nagpur Aurangabad or Goa offices?

FARAD CONTINUATION SHEET NO.:

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

WRIT PETITION NO.4298 OF 1989
Suresh Co-op Hsg Soc and ors Vs. M/s Pushpa Const. & ors.

Office Notes, Office Memoranda of coram, appearances, Court's orders or directions and Registrar's orders.	Court's or Judge's orders.

Ms A.R.S.Baxi, for the petitioners.

Mr Rajeshwar, for Respondent no.1E
CORAM: D.B.BHOSALE, J.
DATED: 20th September, 2004.

P.C.:

For the reasons recorded in the accompanying judgment, the Court passes the following operative order :

"This writ petition is allowed. The impugned order dated 29.6.1989 is quashed and set aside. There will be no order as to costs. Rule is accordingly disposed of."

Dt:30.9.04

For Addl.Registrar,